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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/751,859	01/06/2004	James J. Bartel	7663-000003/COD	4846
27572	7590	08/29/2005		EXAMINER
		HARNESS, DICKEY & PIERCE, P.L.C.		VANAMAN, FRANK BENNETT
		P.O. BOX 828		
		BLOOMFIELD HILLS, MI 48303		ART UNIT
				PAPER NUMBER
			3618	

DATE MAILED: 08/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No.	Applicant(s)	
	10/751,859	BARTEL, JAMES J.	
	Examiner Frank Vanaman	Art Unit 3618	
--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --			
THE REPLY FILED 17 August 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.			
<p>1. <input checked="" type="checkbox"/> The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:</p> <p>a) <input checked="" type="checkbox"/> The period for reply expires <u>3</u> months from the mailing date of the final rejection.</p> <p>b) <input type="checkbox"/> The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.</p> <p>Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).</p>			
<p>Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).</p>			
<p>NOTICE OF APPEAL</p> <p>2. <input type="checkbox"/> The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).</p>			
<p>AMENDMENTS</p> <p>3. <input checked="" type="checkbox"/> The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will <u>not</u> be entered because</p> <p>(a) <input checked="" type="checkbox"/> They raise new issues that would require further consideration and/or search (see NOTE below);</p> <p>(b) <input type="checkbox"/> They raise the issue of new matter (see NOTE below);</p> <p>(c) <input checked="" type="checkbox"/> They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or</p> <p>(d) <input type="checkbox"/> They present additional claims without canceling a corresponding number of finally rejected claims.</p> <p>NOTE: <u>See Continuation Sheet.</u> (See 37 CFR 1.116 and 41.33(a)).</p>			
<p>4. <input type="checkbox"/> The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).</p> <p>5. <input type="checkbox"/> Applicant's reply has overcome the following rejection(s): _____. </p>			
<p>6. <input type="checkbox"/> Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).</p>			
<p>7. <input type="checkbox"/> For purposes of appeal, the proposed amendment(s): a) <input type="checkbox"/> will not be entered, or b) <input type="checkbox"/> will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.</p> <p>The status of the claim(s) is (or will be) as follows:</p> <p>Claim(s) allowed: _____. </p> <p>Claim(s) objected to: _____. </p> <p>Claim(s) rejected: _____. </p> <p>Claim(s) withdrawn from consideration: _____. </p>			
<p>AFFIDAVIT OR OTHER EVIDENCE</p> <p>8. <input type="checkbox"/> The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will <u>not</u> be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).</p> <p>9. <input type="checkbox"/> The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will <u>not</u> be entered because the affidavit or other evidence failed to overcome <u>all</u> rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).</p> <p>10. <input type="checkbox"/> The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.</p>			
<p>REQUEST FOR RECONSIDERATION/OTHER</p> <p>11. <input checked="" type="checkbox"/> The request for reconsideration has been considered but does NOT place the application in condition for allowance because: <u>See Continuation Sheet.</u></p>			
<p>12. <input type="checkbox"/> Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____</p> <p>13. <input type="checkbox"/> Other: _____. </p>			
 <p>Frank Vanaman 8/24/05 Primary Examiner Art Unit 3618</p>			

Continuation of 3. NOTE: The material proposed for addition to the claims would require further consideration at this time, and it is not clear, in view of the rejection set forth in the final office action being essentially identical to that set forth in the first office action, why such an amendment was not presented earlier. In the independent claims, the combination of "approximately" and "near" appears somewhat confusing, or redundant. The proposed amendment does not reduce the issues for appeal inasmuch as it introduces material not previously treated in the prosecution history. Applicant has failed to address the issue of a divisional application necessarily including only material present in the parent application, which issue was explicitly addressed in the office actions. The deletion of 'perpendicular' in claim 23 and addition of 'with respect to the load floor' would be understood to direct the claim to the elected embodiment, however such a change after Final Rejection, when the issue was explicitly raised in the first office action and not appropriately treated by applicant in response thereto, would not be considered reasonable.

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's comments have been carefully considered. As regards applicant's assertion that the reduction of moving parts is not deemed to be an adequate reason for making a modification, applicant has provided no evidence to support such an assertion, and while applicant may simply argue the point, the arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). Reduction of excess moving parts results in less operational friction and backlash, and the examiner expresses some surprise that applicant is unaware of this.

As regards applicant's assertion that there is a lack of motivation to combine as seen in the individual references, a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference (see *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)), with skill being presumed on the part of the artisan, rather than the lack thereof (see *In re Sovish* 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985)); further, references may be combined although none of them explicitly suggests combining one with the other (see *In re Nilssen* 7 USPQ2d 1500 (Fed. Cir. 1989)). It has long been the law that the motivation to combine need not be found in prior art references, but equally can be found "in the knowledge generally available to one of ordinary skill in the art." *In re Jones*, 958 F.2d 347, 351 (Fed. Cir. 1992) (citing *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988)).

The motivation to combine can be found either in a prior art reference, or it can be implicit in the knowledge of one of ordinary skill in the art. See *In re Huston*, 308 F.3d 1267, 1280 (Fed. Cir. 2002); *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1472 (Fed. Cir. 1997).

Sources suggesting a combination may be: (1) the combined teachings of the prior art, (2) the knowledge of the ordinary practitioner and (3) the nature of the problem to be solved. "The test for implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art." *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000).

In *Richard Ruiz and Foundation Anchoring Systems, Inc. v. A.B. Chance Company*, No. 03-1333 (Fed. Cir. January 29, 2004), the court emphasized that an "express written teaching in the art" to combine references was not required [emphasis added]. Rather, motivation may come from "the nature of a problem to be solved, leading inventors to look to references relating to possible solutions to that problem."

Please further note the following from Section 2144 of the MPEP: "The rationale to modify or combine the prior art does not have to be expressly stated in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent...The reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem...It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by Applicant." Also Chief Judge Nies writes in a concurring opinion, "While there must be some teaching, reason, suggestion, or motivation to combine existing elements to produce the claimed device, it is not necessary that the cited references or the prior art specifically suggest making the combination...In sum, it is off the mark for litigants to argue, as many do, that an invention cannot be held to have been obvious unless a suggestion to combine prior art teachings is found in a specific reference". See *In re Oetiker* 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). .